(1) Supreme Court, U.S.
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In The
Supreme Court of the United States

SOUTHEASTERN FERTILITY CENTER, P.A.,

Petitioner,

v.

AETNA CASUALTY & SURETY CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Did the District Court violate principles of federalism by deciding the socially important and dispositive novel issue of this case -- whether, under South Carolina law, the destruction of cryogenically stored sperm is a "bodily injury" as that term is defined in a commercial general liability insurance policy -- without any precedent and based on a procedural point, rather than certifying the issue to the South Carolina Supreme Court for a substantive analysis?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Southeastern Fertility Center v. The Aetna Casualty and Surety Company was an unpublished decision which has been reproduced and attached in the Appendix hereto. (App. 1).

The Orders of the United States District Court for the District of South Carolina in Southeastern Fertility Center v. The Aetna Casualty and Surety Company were unpublished decisions which have been reproduced and attached in the Appendix hereto. (App. 9, 15).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of South Carolina was entered on February 28, 2000. The Order denying the rehearing of the case was entered on March 24, 2000. (App. 39). This petition for writ of certiorari is filed within ninety days from that date.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

This action began in the South Carolina Court of Common Pleas for Berkeley County as an insurance coverage dispute but was removed to the United States District Court for the District of South Carolina based on diversity jurisdiction. (App. 4).

In October 1984, Richard Jablonski was diagnosed with Hodgkin's Disease and was forced to undergo a medical treatment that had a high risk of sterilization. (App. 3). So that he could later have children, he stored samples of his

sperm with Dr. Grant W. Patton and his clinic, Southeastern Fertility Center, P.A. ("Southeastern"). (App. 3).

The medical treatment did render Mr. Jablonski sterile. (App. 3). Unfortunately, in October 1989, an employee of Southeastern removed the samples from the freezer and threw them away. (App. 3). Mr. Jablonski first learned that the samples had been destroyed in August 1991 when his wife contacted Southeastern about artificial insemination. (App. 3).

The Jablonskis sued Southeastern for the destruction of the specimens. (App. 4). Southeastern settled the claim for bodily injury and property damage for $1,100,000. (App. 3). Southeastern contended that its insurer, Aetna, insured it against Mr. Jablonski's claim under a series of standard commercial general liability policies issued to it by Aetna.

Aetna had issued three insurance polices to Southeastern. (App. 4). The standard language of Aetna's policies included the following coverage: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." (App. 4). Bodily injury was defined in circular fashion by the policies: "'Bodily injury' means bodily injury, sickness or disease sustained by a person . . ." (App. 5).

Despite presenting the claim to Aetna in 1992, 1994, and 1995 for indemnification and defense, Aetna refused to provide a defense or coverage. (App. 3). The District Court granted in part a Motion for Summary Judgment filed by Aetna. The District Court ruled that, because there was an exclusion in the policies for property damage to the personal property of others in the care, custody, or control of the insured, there was no coverage for the destruction of Mr. Jablonski's sperm. (App. 5, 6).

Southeastern moved the District Court to reconsider its decision, focusing on Mr. Jablonski's claim as one for bodily injury rather than property damage, but the District

Court refused. (App. 6). It also refused to certify the question to the South Carolina Supreme Court. (App. 6).

So that this appeal could be taken immediately, Southeastern moved under Federal Rule 54(b) to have a final judgment entered. (App. 7). The District Court granted the motion and entered a final judgment on May 6, 1999 on the summary judgment order. (App. 40.).

The Fourth Circuit Court of Appeals heard oral arguments on January 25, 2000. After reviewing the history of the case, the Court summarily affirmed without discussion.

LEGAL ARGUMENT

I. The District Court improperly invaded the province of the state courts by refusing to certify the dispositive issue of this case since there was no direct authority from South Carolina upon which to base a prediction of state law.

In this insurance dispute, the dispositive issue was whether, if one is liable for negligently destroying a now-sterile man's stored sperm, the injury to the infertile man is a form of bodily injury. If so, there was insurance coverage. This issue should have been sent to the South Carolina Supreme Court for resolution.

In diversity cases, the federal courts are required to apply the law of the forum jurisdiction as it exists. This principle has been the law of the United States Supreme Court for over sixty years:

> Except as to matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a

> matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature of "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938). Moreover, the federal courts may not create state law as they see fit or at their own pleasure, but must sincerely endeavor to predict the outcome as if the case had been tried in the state courts. As Justice Stone wrote,

> State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.

West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1940).

Aetna removed this action based on the diversity of citizenship of the parties and not because any issue of federal statutory law was concerned. Thus, the District Court should have followed the law of South Carolina in resolving the issues raised by the parties. The District Court was not free to simply assume or guess at how any substantive issue in this case would have been resolved. Rather, it was bound to consider the actual sources of judicial authority from South Carolina. Holdren v. Legursky, 16 F.3d 57 (4th Cir. 1994); Holt v. State Farm Mut. Auto Ins. Co., 870 F. Supp. 658

(D.S.C. 1994). If decisions of the state's highest court are unavailable, the federal courts must still try to follow state law by looking to other sources of precedent such as opinions of attorneys general and dicta. 19 Charles A. Wright, et al., Federal Practice and Procedure, § 4507, at 163-69 (2d ed. 1996).

Most states have adopted mechanisms which permit the state courts to decide the law for themselves while leaving jurisdiction over the case in the federal courts. These procedures, known as certification, are used when there is no authority upon which a federal court can speculate about the law in the forum jurisdiction. South Carolina has such a procedure for issuing opinions upon the request of the federal courts. S.C.A.C.R. 228.

It was an abuse of discretion for the District Court to decline certification of the issues raised in this case. Of course, litigants do not have the unfettered right to demand that every issue of importance be resolved by the state courts. Rather, the federal courts have discretion in the matter. See Lehman Bros. v. Shein, 416 U.S. 386, 94 S. Ct. 1741 (1974). However, that discretion must be employed thoughtfully with regard to several factors. Indeed, the appellate court below has itself indicated that certification should be a favored tool. See Jones ex rel. Jones v. Heckler, 754 F.2d 519, 520 (4th Cir. 1985) (admonishing the Mississippi Supreme Court for rejecting a certified question as "striking an undesirable blow against the developing and potentially enormously helpful procedure under which certification of unresolved and important questions of state law may be referred to the court best equipped to provide answers to them").

Here, the District Court did not consider at all, much less properly weigh, the factors involved in certifying an issue. One court of appeals has listed the factors to consider including the following most important factors: "the closeness of the question and the existence of sufficient sources of state law -- statutes, judicial decisions, attorney

general's opinions -- to allow a principled rather than conjectural conclusion." Barnes v. Atlantic & Pac. Life Ins. Co. of Am., 514 F.2d 704, 705 n.4 (5th Cir. 1975). In this case, there was absolutely no authority from any jurisdiction which directly addressed the critical issue in this case or which would tend clearly to establish two or more trends regarding these issues. Thus, it is impossible to say whether the facts of this case are clearly in line with one line of authority over another.

More importantly, however, apart from whether there is some split in authority in other jurisdictions, there is certainly no authority from South Carolina addressing the issue directly at all. "Especially in cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel. Meanwhile, federal judges, by no means a high-rolling bunch, are put in the uncomfortable position of making a choice." Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting). The complete lack of controlling authority from South Carolina makes this the textbook example of a case in which certification was proper.

Since the District Court was not permitted to make up South Carolina law for itself and since there was no direct authority upon which an educated guess about South Carolina's law might have been made, the District Court should have availed itself of South Carolina's certification process. Resolving this case in any other way violated the principles of Erie.

Further erring, the District Court did not even decide the novel issue based on the merits of the argument, but instead, passively allowed the issue to be settled based on its flawed application of a procedural defense. Southeastern had, at first, suggested that the injury might be covered as property damage. The District Court errantly agreed with Aetna's defense of judicial estoppel to prevent Southeastern from raising the possibility that it might also be covered as bodily injury on a Motion to Alter or Amend.

Judicial estoppel simply did not apply to this case because none of the required elements of that doctrine existed. See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); Allen v. Zurich Insurance Co., 667 F.2d 1162, 1166 (4th Cir. 1982). As stated in Sedlack, a case cited by Respondent to the lower court, "[A]t lease three elements must always be satisfied. First, the party sought to be estopped must assert a position inconsistent with that taken in prior litigation and the position must be one of fact rather than law or legal theory. Second, the prior inconsistent position must have been accepted by the court. And third, the party sought to be estopped must intentionally have misled the court to gain unfair advantage." Sedlack, 134 F.3d at 224 (citations omitted).

None of the elements of that doctrine appears in this case. First, there was no prior litigation in which any position, much less an inconsistent one, was taken. Southeastern only offered alternate legal theories and not different facts when it requested that its claim be considered under both the property and bodily injury terms of the insurance policy. Second, that Southestern's first position was not accepted by the District Court. Third, there was no allegation even made that Southeastern sought unfair advantage by intentionally misleading the court.

It is important for this Court to intervene in the process and correct the error of the District Court. Cases involving damage to one's separated genes, cells, tissues, organs, and limbs, although novel now, are sure to become more frequent as medical science makes advances in the fields of embryonics, genetics, cryonics, and cloning. How such matters are regarded, at least in South Carolina, should not be decided for the first time by the federal courts.

Even if the matter never appears again, however, this Court should correct the errors of the District Court. This Court's own precedent established in Erie does not turn on the relative importance of the legal question to be decided; states have a right to decide all questions of state law for

themselves, from trivial procedural issues to sweeping matters of general concern. It should be left to South Carolina's Supreme Court to determine whether the issue here is so unimportant that it would deny certification.

The District Court had an obligation to allow South Carolina to decide for itself how to answer the issue raised by this case. It certainly should not have created substantive precedent based on a flawed application of a technical and procedural doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeal for the Fourth Circuit and, ultimately, to reverse the District Court and order that the issue described above be certified to the South Carolina Supreme Court.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTHEASTERN FERTILITY CENTER,

Plaintiff-Appellant,

v.

THE AETNA CASUALTY AND
SURETY COMPANY,*

Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Duffy, District Judge.

(CA-97-1602-2)

No. 99-1736

Argued: January 25, 2000
Decided: February 28, 2000
Entered: February 28, 2000

Before NIEMEYER, Circuit Judge, HAMILTON, Senior Circuit Judge, and J. Frederick MOTZ, Chief United States District Judge for the District of Maryland, sitting by designation.

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*Although Aetna is now known as the Travelers Casualty and Surety Company, we will still refer to the appellee in this case as Aetna.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Donald Bruce Clark, Arnold Samuel Goodstein, ROSEN, GOODSTEIN & HAGOOD, L.L.C., Charleston, South Carolina, for Appellant. Mark Hedderman Wall, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Charleston, South Carolina, for Appellee. **ON BRIEF:** Linda B. Foster, Andrew R. Diamond, WEISSMAN, NOWACK, CURRY & WILCO, P.C., Atlanta, Georgia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

In this action for coverage under successive general commercial liability insurance policies, Southeastern Fertility Center, P.A. (Southeastern) challenges the district court's grant of summary judgment in favor of Aetna Casualty & Surety Co. (Aetna) on Southeastern's claims alleging breach of contract and breach of the duty of good faith and fair dealing with respect to Aetna's obligations under the policies to provide indemnification and a defense to litigation. Southeastern also challenges the district court's failure to certify two particular questions to the South Carolina Supreme Court. We affirm on the reasoning of the district court.

The facts in this case are undisputed. In October 1984, Richard Jablonski (Jablonski) was diagnosed with Hodgkin's Disease. Concerned that treatment for the disease would render him sterile, Jablonski sought treatment from Dr. Grant Patton (Dr. Patton) for the purpose of storing some of his sperm. In late 1984 and early 1985, Jablonski made several deposits of his sperm for frozen storage with Southeastern, a professional association owned by Dr. Patton.

Southeastern stored Jablonski's sperm for over four years. During this time, Jablonski ceased paying storage fees to Southeastern, and Southeastern lost all contact with Jablonski. At some point, Jablonski paid $288 to a collection agency to satisfy his account with Southeastern, but the record is unclear whether the collection agency ever transferred the payment to Southeastern. Operating under the belief that Jablonski had not paid his storage fees for a significant period of time, in October 1989, Southeastern thawed Jablonski's stored sperm and discarded it.

Nearly two years later, in August 1991, Jablonski's wife, Patricia Jablonski, contacted Southeastern in an attempt to retrieve her husband's stored sperm. By this time, Jablonski's treatment for Hodgkin's Disease had left him sterile. Upon contacting Southeastern, Patricia Jablonski learned that her husband's stored sperm had been destroyed.

The Jablonskis subsequently filed a civil action in South Carolina state court against Southeastern, among others, to recover damages for the destruction of Jablonski's stored sperm. Once in 1992, once in 1994, and once in 1995, Southeastern requested that Aetna defend it against the state court action pursuant to several general commercial liability policies. On all three occasions, Aetna refused Southeastern's request.

The South Carolina Medical Malpractice Joint Underwriting Authority, which provided Southeastern an upper limit of $100,000 in coverage, defended Southeastern in the state action. Southeastern eventually settled the case in

October 1996 by executing a confession of judgment in favor of Jablonski for $1.1 million, with the stipulation that Jablonski could not enforce the confession of judgment against the assets of Southeastern or its agents. Additionally, under the terms of the settlement, Jablonski possessed the right to collect under any applicable insurance policies held by Southeastern. The Joint Underwriters Association paid its limit of $100,000 to the Jablonskis, leaving $1 million of the judgment unsatisfied.

The present coverage action by Southeastern followed. The case was originally filed in South Carolina state court on April 25, 1997, but was removed to the United States District Court for the District of South Carolina on May 30, 1997, based upon diversity jurisdiction. See 28 U.S.C. § 1332. Southeastern's coverage action asserts two claims under South Carolina law--a breach of contract claim, seeking compensatory damages, and a breach of the duty of good faith and fair dealing claim, seeking compensatory and punitive damages.

Three of the four insurance policies at issue below are at issue in this appeal. All three are general commercial liability policies. The first was issued by Aetna to Dr. Patton and his wife for the coverage period of October 31, 1988 to October 31, 1989. The second was issued by Aetna to Dr. Patton and his wife for the coverage period of October 31, 1989 to October 31, 1990. The third was issued by Aetna to Southeastern for the coverage period of October 31, 1990 to October 31, 1991.

The following policy language at issue in this appeal is identical in all three policies (the Three Policies):

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or" propertydamage" to which this insurance applies. . . . The bodily injury or property damage must be caused by an "occurrence."

(J.A. 156).

> This insurance does not apply to: . . . "Property damage" to:. . . (4) Personal property in your care, custody or control. . . .

(J.A. 158).

> "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

(J.A. 164).

> "Property Damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property; or
> b. Loss of use of tangible property that is not physically injured.

(J.A. 166).

On March 31, 1998, the parties filed cross motions for summary judgment, including supporting memoranda. After conducting a hearing on the cross motions and considering the parties' supporting memoranda, on February 22, 1999, the district court issued an order granting summary judgment in favor of Aetna on the breach of contract claim and denying summary judgment in favor of Southeastern on the breach of contract claim. In its order, the district court thoroughly explained that it ruled in favor of Aetna on the breach of contract claim involving the Three Policies on the basis that Jablonski's stored sperm constituted his personal property, and therefore, its destruction in 1989 was plainly excluded from coverage under the exclusion for coverage of

damage to the personal property of others in the care, custody, and control of the insured. Under the district court's reasoning, the exclusion was applicable regardless of which of the Three Policies was in effect at the time Southeastern destroyed Jablonski's stored sperm.

With respect to Southeastern's cause of action for breach of the duty of good faith and fair dealing, the district court granted summary judgment in favor of Aetna and denied summary judgment in favor of Southeastern to the extent Southeastern's claim alleged bad faith refusal to pay benefits, bad faith refusal to defend, and entitlement to punitive damages. However, relying on the South Carolina Supreme Court's decision in Tadlock Painting Co. v. Maryland Casualty Co., 473 S.E.2d 52 (S.C. 1996), the district court held that Southeastern could proceed to trial on its breach of the duty of good faith and fair dealing claim to the extent Southeastern claimed that Aetna acted in bad faith in the handling or processing of its claim despite the fact that Aetna had not breached any express contractual term of the Three Policies or the fourth policy not at issue in this appeal. The district court refused to grant summary judgment in favor of Southeastern on this remaining portion of its breach of the duty of good faith and fair dealing claim.

On March 4, 1999, Southeastern filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the judgment and/or to certify to the South Carolina Supreme Court the question of when the loss occurred for purposes of triggering coverage under the Three Policies. On March 5, 1999, Southeastern supplemented its Rule 59(e) motion with an additional argument and requested that the district court certify to the South Carolina Supreme Court the question of the applicability of the exclusion for damage to personal property in the care, custody, and control of the insured. The district court denied the motion, as supplemented, in toto on April 7, 1999 on the basis that its prior analysis of Southeastern's claims upon which it granted summary judgment in favor of Aetna was sound.

On May 3, 1999, Southeastern filed a motion, pursuant to Federal Rule of Civil Procedure 54(b), asking the district court to certify its February 22, 1999 and April 7, 1999 orders for immediate appellate review and to stay the trial of the surviving portion of its breach of the duty of good faith and fair dealing claim. The district court granted Southeastern's Rule 54(b) motion and entered final judgment with respect to the claims upon which it granted summary judgment in favor of Aetna.

Southeastern noted a timely appeal. On appeal, Southeastern argues: (1) the district court erred in holding the personal property exclusion precluded coverage under the Three Policies; (2) Jablonski suffered bodily injury within the meaning of the Three Policies when Southeastern destroyed his stored sperm; (3) that because bodily injury is involved with lingering mental anguish, the district court erred in holding that the damage only occurred in 1989 when the stored sperm was actually destroyed; and (4) the district court erred in failing to certify the questions outlined in Southeastern's Rule 59(e) motion to the South Carolina Supreme Court.

We review a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party. See Figgie Int'l, Inc. v. Destileria Serralles, Inc., 190 F.3d 252, 255 (4th Cir. 1999). We review a district court's failure to certify a question to a state's highest court for abuse of discretion. See Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Upon review of the briefs and the record, and after consideration of oral arguments, we conclude that the district court correctly granted summary judgment in favor of Aetna on Southeastern's claims involving the Three Policies and did not abuse its discretion in failing to certify the questions outlined in Southeastern's Rule 59(e) motion to the South Carolina Supreme Court. Accordingly, we affirm the judgment in favor of Aetna on the reasoning of the district court. See Southeastern Fertility Ctr., P.A. v. Aetna Cas. &

Sur. Co., Civ. A. No. DKC 2:97-1602-23 (D.S.C. Feb. 22, 1999 & Apr. 7, 1999).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Southeastern Fertility Center, P.A.	)	
	)	C.A. No. 2:97-1602-23
Plaintiff,	)	
v.	)	**ORDER**
Aetna Casualty & Surety Co.,	)	
Defendant.	)	

Entered: April 7, 1999

On February 22, 1999, this court issued an order granting defendant's motion for summary judgment in part, denying it in part, and denying plaintiff's motion for summary judgment. Specifically, the court granted defendant's motion with respect to plaintiff's claim for breach of contract, holding that the loss in question (the destruction of Richard Jablonski's sperm by plaintiff) was not covered by any of the insurance polices at issue. Plaintiff has now filed two motions to alter or amend the court's judgment or to certify a question of law to the South Carolina Supreme Court, which will be addressed in turn.

Plaintiff's first motion is based on the rationale that the "loss or occurrence" which allegedly triggered coverage under the liability insurance policies in this case occurred in 1991. As explained in this court's summary judgment order, this lawsuit arose after plaintiff settled a lawsuit against it in state court that had been brought by a man name Richard Jablonski. Mr. Jablonski had stored some of his sperm at

plaintiff's facility for later use, as he was undergoing cancer treatment which eventually rendered him sterile. Plaintiff later disposed of his sperm, apparently believing that Mr. Jablonski no longer wanted it and that he had ceased payment on his account. In its order, the court concluded that the relevant "loss or occurrence" was the disposal of Mr. Jablonski's sperm, which occurred in October of 1989.[1] Now, however, plaintiff claims that the event which triggered coverage under the liability policies at issue did not occur until August of 1991 -- the time at which Mrs. Jablonski attempted to retrieve the sperm from plaintiff and learned that it had been destroyed.

In support of its argument, plaintiff relies almost entirely on the case of Joe Harden Builders, Inc. v. Aetna Casualty and Surety Co., 486 S.E.2d 89 (S.C. 1997). That case also involved a claim under an "occurrence" policy similar to the one at issue in this case, and concerned questions of coverage for progressive damage that resulted from latent construction defects in a condominium project. Specifically, the court address the issue of when the relevant "property damage" should be deemed to have occurred, and whether it occurred during the effective periods of certain insurance policies at issue in the case. The court eventually held that in such a case, liability coverage under a standard "occurrence" policy was triggered "at the time of an injury-in-fact and continuously thereafter to allow for coverage under all policies in effect from the time of the injury-in-fact during the progressive damage." Id. at 91.

Based on Joe Harden Builders, plaintiff now argues that coverage existed under a policy that was in effect in 1991, because the relevant "loss or occurrence" that triggered coverage (i.e., the relevant "damage") did not occur until

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[1]In its motion, plaintiff states that the court "assumed" that the date of the occurrence or loss which triggered coverage was October of 1989. Indeed, to whatever extent the court made such an "assumption," it did so because at oral argument, plaintiff appeared to agree that such was the case. See infra.

August of 1991, when Mrs. Jablonski sought to retrieve Mr. Jablonski's sperm and learned that it had been disposed of. Plaintiff's motion, however, must fail for several reasons, some of which are not even related to the merits of plaintiff's substantive legal arguments.

First and foremost, it is worth noting that not only did plaintiff never present such an argument before this time, it also conceded away such a position during the hearing on these summary judgment motions. During that hearing, plaintiff's counsel expressly acknowledged that it was the 1989 policy, and not any later policies, that "would have been the policy that would have covered the tort as it occurred." Transcript of 10/21/98 Summary Judgment Hearing (hereafter "Transcript"), p. 13:4-9. Plaintiff's counsel subsequently stated that the cause of action for breach of contract (i.e., the coverage action) was being brought under the 1989 policy, and that the later policies were implicated only by the cause of action for bad faith. Transcript, p. 16:23-17:6. Thus, plaintiff conceded away any position involving an argument that coverage existed under any policies issued after 1989.

Second, plaintiff's new argument is based on damage allegedly suffered by Mrs. Jablonski -- specifically, the "injury" that she sustained when she learned that Mr. Jablonski's sperm had been disposed of and that she therefore would never be able to become pregnant and bear his child. See Plaintiff's Memorandum in Support of Motion to Alter or Amend Judgment, p.7 ("In this case, the bodily injury or property damage occurred in 1991 when Mrs. Jablonski wanted to get pregnant and was unable to do so. THAT was the year she was injured.") (Caps in original). However, to whatever extent Mrs. Jablonski may have suffered an "injury" or "loss" as a result of the destruction of Mr. Jablonski's sperm, it is irrelevant. The sperm was not her "property," nor can its destruction be said to constitute "bodily injury" to her in any way. Furthermore (and most importantly), as defendant correctly notes, it is not Mrs.

Jablonski who holds a confession of judgment against plaintiff that could be subject to indemnification by defendant -- it is Mr. Jablonski. Mr. Jablonski was the only named plaintiff in the state court lawsuit which followed the destruction of his sperm, and which allegedly triggered coverage under the policies at issue in this case. Thus, to whatever extent defendant may have been obligated to provide coverage to plaintiff, it was only so obligated as a result of a loss sustained by Mr. Jablonski, which was the subject of the underlying state tort action in which he was the sole plaintiff, and which was memorialized in the Confession of Judgment which he alone now holds.

Third, plaintiff neglects to address the fact that, setting aside the issue surrounding the timing of the events in this case, the court articulated several alternate grounds for holding that defendant was not obligated to provide coverage under the post-1989 policies. See Summary Judgment Order of 2/22/99, p. 19. With the exception of the court's discussion of the "care, custody, and control" exclusion contained in the general liability policies at issue in this case (which plaintiff addresses in its Supplemental Motion to Alter or Amend Judgment, and which the court will address infra), plaintiff does not discuss these alternate grounds.

Lastly, plaintiff's argument fails on its substantive merits, as well. In Joe Harden Builders, the South Carolina Supreme Court endeavored only to answer the following narrow question which had been certified to it by the United States District Court for the District of South Carolina:

Where defective construction causes progressive property damage that is otherwise covered by insurance, is the property damage deemed to occur:

1. When the concrete frame is constructed out of plumb;
2. When the masonry contractor knowingly builds the defective brick wall;

3. When the failure of the brick wall is manifest;
4. When the owner actually discovers the failure of the brick wall; or
5. At some other time?

This case involves neither defective construction nor progressive property damage that developed over time. It involved a single, discrete, injury-causing act which resulted in a simultaneous loss, which was not discovered until a later date.

Moreover, there is another fundamental flaw in plaintiff's substantive argument, in that it actually rest on a theory that was explicitly rejected in Joe Harden Builders. In that case, the court considered several possible theories for determining when coverage was triggered under an "occurrence" policy. One of the theories which was considered (and rejected) would have held that coverage is triggered at the time the injury is manifested or first discovered, "even if some damage actually occurred earlier but was undetected." Joe Harden Builders, 486 S.E.2d at 90-91. In its motion, however, that is exactly what plaintiff is asking the court to do -- it is asking the court to hold that, for purposes of triggering coverage under the policies at issue, the relevant "bodily injury or property damage" occurred in August of 1991, at the time Mrs. Jablonski sought to retrieve the sperm and discovered that it had been discarded. This is, plaintiff would have the court hold that the touchstone of determining when the injury occurred is the discovery of the loss. However, the fact is that to whatever extent the Jablonskis were "injured" or "damaged" by the loss of the sperm, that "injury or damage" began at the time the sperm was destroyed, because it was at that time that they were rendered unable to conceive a child. The fact that the damage was not apparent to them or not discovered by them at the time is immaterial. Thus, their argument rests on a theory rejected by the very case they cite in support -- the

theory that "injury or damage" is deemed to occur at the time it is discovered, even though certain damage has already occurred as a result of a prior injury-causing event, but gone undetected.

Plaintiff's second motion to alter or amend the court's summary judgment order, or to certify a question to the South Carolina Supreme Court, argues that the "care, custody, and control" exclusion in the liability policies at issue does not apply. Specifically, plaintiff argues that the exclusion applies only to "personal property" damage, that Mr. Jablonski's sperm was not "personal property," and therefore that the "damage" suffered in this case was not "property damage," but "bodily injury." In addition to citing absolutely no authority for its position, plaintiff conceded this point away at oral argument as well. See Transcript, p. 23:20-24:8 (Plaintiff's counsel argues, "[I]f it isn't property, I don't know what it is.")

It is therefore,

ORDERED, for the foregoing reasons, that plaintiff's Motion and Supplemental Motion to Alter or Amend Judgment or to Certify a Question to the South Carolina Supreme Court are **DENIED.**

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy
United States District Judge

Charleston, South Carolina
April 7th, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Southeastern Fertility Center, P.A.,	)	
Plaintiff,	)	C.A. No. 2:97-1602-23
v.	)	**ORDER**
Aetna Casualty & Surety Co.,	)	
Defendant.	)	

Entered: February 22, 1999

This matter comes before the court on cross-motions for summary judgment. The court heard oral arguments on October 21, 1998, took the motions under advisement, and now issues the following Order.

I. BACKGROUND

A. The Jablonski Litigation

This litigation arises out of defendant's failure to provide a defense for plaintiff in a lawsuit in which plaintiff was sued by a man named Richard Jablonski in state court. The undisputed facts are as follows:

In October of 1984, Richard Jablonski was diagnosed with Hodgkin's Disease. His oncologist advised Mr. Jablonski of the risk that treatment for Hodgkin's Disease could render him sterile, so Mr. Jablonski consulted with and was treated by Dr. Grant Patton for the purposes of storing

some of his sperm. In late 1984 and early 1985, Mr. Jablonski made several deposits of his sperm for storage with plaintiff. Upon completion of his treatment for Hodgkin's Disease, Mr. Jablonski was rendered sterile.

Mr. Jablonski's sperm was stored for over four years, during which time plaintiff lost contact with him and he ceased payments on his account with plaintiff. Plaintiff's mailings to Mr. Jablonski were returned. At some point, Mr. Jablonski apparently paid $288.00 to a collection agency to satisfy his account with plaintiff -- however, it is unclear whether that payment was passed on to plaintiff. At any rate, it is undisputed that plaintiff, operating under the belief that Mr. Jablonski had not paid his storage fees, decided to dispose of Mr. Jablonski's sperm in October of 1989, and an employee of plaintiff removed the sperm from its freezer, allowed it to thaw, and placed it in a hazardous waste container to be discarded. Nearly two years later, in August of 1991, Mr. Jablonski's wife contacted plaintiff in an attempt to retrieve her husband's sperm, only to learn that it had been thrown out.

Subsequently, the Jablonskis sued plaintiff in state court. Plaintiff tendered the suit to defendant (now known as "Travelers Casualty and Surety Company") on three occasions, in 1992, 1994, and 1995, to provide it with representation and a defense in the Jablonski suit. On all three occasions, defendant declined to provide representation or a defense, or to negotiate a settlement, or otherwise to act on plaintiff's behalf to resolve the matter. Plaintiff was defended by the South Carolina Medical Malpractice Joint Underwriting Authority (JUA), which provided an upper limit of $100,000 of coverage. Plaintiff eventually settled with the Jablonskis in October of 1996, and entered into a Confession of Judgemnt of $1.1 million and a Covenant not to Execute. Pursuant to the settlement, the Jablonskis agreed not to enforce the judgment against the assets of plaintiff or its agents, but reserved the right to collect against any applicable insurance policies held by plaintiff. The JUA

paid its limits of $100,000 to the Jablonskis, leaving $1 million of the judgment unsatisfied thus far. This coverage action followed.

B. The Insurance Policies

Between the years of 1988 and 1991, defendant and/or one of its subsidiaries issued the following relevant policies to plaintiff:

Policy Number	Named Insured	Effective Dates
025 ACM 5429772	Grant W. Patton & Wife Penny	10/31/88-10/31/89
025 ACM 5700685	Grant W. Patton and Wife Penny	10/31/89-10/31/90
025 XS 6393145	Southeastern Fertility Center, P.A.	2/13/90-10/31/90
025 BQ 21178964	Southeastern Fertility Center, P.A.	10/31/90-10/31/91

The first two policies contain commercial general liability and commercial property coverage forms. The third policy contains only an excess liability, or "umbrella" coverage form. The fourth policy contains commercial general liability, commercial property, and umbrella liabiltiy coverage forms.

Initially, plaintiff asserted that defendant was obligated to provide coverage (and a defense in the Jablonski lawsuit) under the fourth policy, which had an issuance date

of October 31, 1990 ("the 1990 policy"). However, that policy is an "occurrence" policy, which means that its coverage is triggered only if the "loss" or "occurrence" which gives rise to the need for coverage occurred within the policy period. In this case, the "loss" (the destruction of Mr. Jablonski's sperm) occurred in October of 1989, which is not within the policy period of the 1990 policy. Therefore, plaintiff now contends that defendant's obligation to provide coverage arose not under that policy, but under one of the first two policies (hereafter referred to as "the 1988 and 1989 policies").[1] Additionally, plaintiff also contends that, while the 1990 policy did not cover the loss, defendant nevertheless acted in bad faith in determining that it did not provide coverage. Plaintiff's claims will be addressed in turn.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to

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[1] Regarding the first two policies, since an exact date for the disposal of Mr. Jablonski's sperm cannot be ascertained (all that is known is that it occurred in October of 1989), there is some question as to whether it occurred during the coverage period of the first policy (which expired on October 31, 1989) or the second policy (which went into effect on October 31, 1989). However, it is undisputed that it occurred within the policy period of one or the other, and since the relevant provisions of the two policies are identical, the determination of exactly which policy was in effect at the time is immaterial.

It also should be noted that, while plaintiff acknowledges that the relevant events did not occur during the policy period of the 1990 policy, it nonetheless argues that, for reasons which will be discussed in greater detail infra, defendant should be estopped to argue that there was no coverage under the 1990 policy.

make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-124 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." Celotex, 477 U.S. at 322. The "obligation of the nonmoving party is "particularly strong when the nonmoving party bears the burden of proof/" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th) Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)), cert. denied, 116 S. Ct. 190 (1995). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." Celotex, 477 U.S. at 327.

III. ANALYSIS

A. Breach of Contract

Insurance policies are contracts and, therefore, are subject to the general rules of contract construction. Sloan Construction, Inc. v. Central Nat. Ins. Co. of Omaha, 236 S.E.2d 818, 819 (S.C. 1977). It is the job of the court to "enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Id. In the absence of a prescribed definition of an

insurance polity, the terms in the policy should be defined according to the ordinary and usual understanding of their significance to ordinary people. USAA Property and Cas. Ins. Co. v. Rowland, 435 S.E.2d 879, 881-82 (S.C. Ct. App. 1983). Courts may not torture the meaning of a policy to extend coverage that is excluded by its terms. Greenville County v. The Reserve Fund, 427 S.E.2d 913, 916 (S.C. Ct. App.), rev'd on other grounds, 443 S.E.2d 552 (S.C. 1994). However, if a policy provision is ambiguous, it should be construed to the benefit of the insured. Id. Likewise, the rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. McPherson v. Michigan Mut. Ins. Co., 426 S.E.2d 770, 771 (S.C. 1993). The insured has the burden of proving the existence and validity of the contract of insurance upon which it seeks coverage. Foster v. United Ins. Co. of America, 158 S.E.2d 201, 203 (S.C. 1967).

(1) The 1988 and 1989 Policies

Since the events upon which plaintiff predicates its claim occurred in October of 1989, plaintiff asserts that it was covered under the 1988 or 1989 policy. Defendant disputes that these policies covered plaintiff at all, as the named insured in those policies is "Grant W. Patton and Wife Penny," not "Southeastern Fertility Center, P.A." However, since a review of those policies indicates that plaintiff would not be entitled to coverage even if it was an insured under those policies, the court will assume without deciding that plaintiff is an insured under them.

(a) The Commercial Property Component

Plaintiff initially claims that defendant is obligated to provide coverage under the commercial property component (i.e., the "Building and Personal Property Coverage Form")

of the 1988 and 1989 policies. Plaintiff argues that coverage exists under this form because it covers "direct physical loss or damage to Covered Property," and that the "Covered Property" includes "personal property of others that is in your care, custody, and control." However, plaintiff's claim under this form is problematic, for several reasons.

First and foremost, the conditions of this component clearly state that any legal action brought against defendant under this form must be brought "within 2 years after the date on which the direct physical loss or damage occurred." In this case, the destruction of the "property" in question took place in October of 1989, and no claim base on that loss was brought until 1998. Indeed, plaintiff's initial complaint in this case, which was filed in April of 1997, only raises claims under the commercial general liability and excess liability forms of the 1990 policy. Even assuming that plaintiff's claim under the commercial property forms of the 1988 and 1989 policies "relates back" to that complaint, the claim is still far too late, and must fail under the policy's two-year time limit.

Second, the commercial property component does not included a duty to defend the insured in a lawsuit -- only a duty to pay the value or cost of replacement or repair of the lost property, assuming that the loss is "covered." The property form does state that defendant "may elect to defend you against suits arising from claims of owners of [lost or damaged] property" (emphasis added), but stops short of imposing a "duty" to defend such claims on behalf of the insured. Thus, to the extent that plaintiff's claim for breach of contract is based on defendant's failure to provide a defense in the suit against plaintiff by Mr. Jablonski, that claim cannot survive -- defendant cannot be said to have breached a contractual duty to provide representation and a defense where none existed

Third, the Building and Personal Property forms of both the 1988 and 1989 policies describe three possible types of "covered property" -- the insured's building, the insured's

"business personal property," and "personal property of others" that is in the "care, custody and control" of the insured. Both of those policies also state that "covered property" is the "types of property for which a Limit of Insurance is shown in the Declarations." The declarations pages attached to the property forms of both the 1988 and 1989 policies, however, show coverage and a limit of insurance only for the "building" -- more importantly, they do not show coverage for "personal property of others," the category which would include Mr. Jablonski's sperm, and upon which plaintiff's claim is based.

The parties have also made substantive arguments regarding the issues of whether the sperm itself constitutes "property," and whether the "loss" or "damage" was "intentional," and thus not subject to coverage under the property form of the policy. However, in light of the aforementioned obstacles to plaintiff's claim under this form, these issues need not be reached. There is clearly no basis for plaintiff's claim under the property forms of the 1988 and 1989 policies.

(b) The Commercial General Liability Component

The issue to which the parties devote perhaps the most attention under this component is that of whether the destruction of Mr. Jablonski's sperm was an "intentional act" that is not covered by the policy. Both the commercial general liability forms of the 1988 and 1989 policies state that the "bodily injury" or "property damage" upon which the claim is predicated must be the result of an "occurrence," which is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." These forms also contain an exclusion for "'bodily injury' or 'property damage' [that is] expected or intended from the standpoint of the insured." Defendant argues that the destruction of Mr. Jablonski's

sperm was an intentional act on the part of plaintiff, and thus that there is no coverage for it under the commercial general liability forms.

South Carolina courts have formulated a two-pronged test for determining whether an "intentional act" which results in bodily injury or property damage is covered under an insurance policy. First, the act resulting in the loss must be intentional, and second, the results of the act (i.e., the bodily injury or property damage caused by the act) must have been intended. Miller v. Fidelity-Phoenix Ins. Co., 231 S.E.2d 701, 702 (S.C. 1977). Miller applied this analysis in the case of a child who had set fire to a house. The court determined that the child's act was intentional, but that the second prong of the test was not satisfied, because the child did not intend the property damage that resulted -- he simply intended to create the excitement of seeing fire trucks come to the house. Id.

In a more recent application of the principles articulated in Miller, the court in Vermont Mutual Ins. Co. v. Singleton, 446 S.E.2d 417 (S.C. 1994), held that the exclusion did not apply in a case involving a fistfight between two high school students named Stephen Webb and Benjamin Singleton. Specifically, the court held that while Webb intended to strike Singleton, he intended only to protect himself, and he did not intended the specific results that occurred (i.e., hitting Singleton in the face and causing extensive eye injuries). Id. at 420. Thus, the court held that the "intentional act" exclusion in the insurance policy at issue did not apply.

In the case at bar, defendant has argued that the exclusion should apply because plaintiff intended both the acts of thawing and disposing of Mr. Jablonski's sperm, and the result of Mr. Jablonski's sperm being totally destroyed so that it could never be used. Plaintiff, on the other hand, argues that the exclusion should not apply, because it did not intend the results that the sperm be destroyed against the Jablonskis' wishes, and that they be left totally unable to

conceive a child. Indeed, plaintiff argues, it was operating under the mistaken assumption that the Jablonskis no longer wanted the sperm -- thus, it could not have intended the results that occurred.

The parties' arguments place this case in a gray area that was not addressed directly in Miller and Singleton, and that has not been addressed in any other South Carolina case. Specifically, it is undisputed that when plaintiff disposed of the sperm, the acts by which it accomplished that task (and thus, the immediate result produced by those acts) were done "on purpose." However, this case embraces the issue of whether the exclusion is inapplicable because there were certain consequential results that were not intended, the potential for which was not known to plaintiff at the time it acted. Miller and Singleton dealt, for the most part, with the issue of whether the "direct" loss or damage was intended, and did not address the issue of whether unintended consequential losses precluded the application of the exclusion.

In support of its position, plaintiff relies on an unpublished Tennessee case, Lyons Diecasting Corp. v. NEC, Inc., 1990 WL 51809 (Tenn. Ct. App. 1990). In Lyons, the insured was a diecasting business that manufactured metal dies, and made machine parts using dies that it stored, but that were owned by others. The insured mistakenly scrapped a large die owned by another company, and the insurance company attempted to deny coverage by invoking an "intentional act" exclusion. The exclusion at issue was based on a definition of the word "occurrence" that is nearly identical to the definitions of "occurrence" and "expected and intended" contained in the policies involved in this case. Id. at *5. The court held that even though the act of scrapping the die and the immediate or "direct" result obtained thereby (i.e., that the die was destroyed and could no longer be used by its owner) were intentional, the exclusion did not apply. Id. Specifically, the court distinguished the case because the insured had been acting

under the mistaken impression that the die was no longer wanted, and noted the "[i]t has been held that an 'intentional injury' exclusion does not apply to intentional acts of the insured which are not wrongful, but which may necessarily cause a consequential loss to a third party." Id. (Citing 43 Am. Jur. 2d Insurance § 708).

Although not bound by this decision, the court finds the rationale articulated in Lyons to be persuasive and in line with South Carolina authority, particularly in light of South Carolina's well-established rule that insurance policies should be construed to the benefit of the insured when such construction would not torture the language of the policy. Thus, defendant cannot seek refuge under the definition of "occurrence" and the "expected and intended" exclusion in the policies at issue. However, there are other provisions in the policy which must be examined before a determination regarding coverage can be made.

The next exclusion invoked by defendant is an exclusion for liability arising from "professional services." The specific exclusion reads, in pertinent part:

> With respect to any operation described in the Schedule, this insurance does not apply to "body injury," "property damage," "personal injury," or "advertising injury" arising out of:
>
> 1. The rendering or failure to render:
>
> a. Medical, surgical, dental, x-ray or nursing service or treatment, or the related furnishing of food or beverages;
>
> b. Any health service or treatment; or
>
> c. Any cosmetic or tonsorial service or treatment.

2. The furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances; or

Defendant argues that, while the isolated act of thawing and disposing of Mr. Jablonski's sperm may not have required any specialized knowledge or skill in an of itself, it was related to and performed in conjunction with a professional service -- specifically, a "health" or "medical" service, for which the policy excludes coverage. That is, defendant argues that the act of disposing of the sperm should not be viewed in isolation, and that the "service" rendered should be considered in its entirety.

Defendant's argument is not persuasive. The South Carolina Supreme Court addressed the concept of "professional services" in South Carolina - Medical Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 354 S.E.2d 378 (S.C. 1987), and noted the following:

> The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential...A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. [Citations omitted]. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself. [Citations omitted].

Id. at 380 (omissions in original) (quoting Marx v. Hartford Accident and Indemnity Co., 157 N.W2d 870, 871-72 (Neb. 1968)). To a certain extent, however, defendant appears to

be asking the court to do exactly what the Ferry court instructed it not to do -- i.e., to look to the title or character of the party performing the act, as opposed to the act itself. Defendant's argument focuses on Dr. Patton's status "as a physician" and asserts that Mr. Jablonski sought his treatment as a health professional, not as someone who "ran a refrigerated warehouse." Aetna's Response to Plaintiff's Motion for Summary Judgment, p. 10 (Emphasis in original). Defendant then recites the professional title and qualifications of the employee of plaintiff who dealt directly with Mr. Jablonski (a woman named Terry Smith), apparently in an effort to illustrate her job as one that could only be performed by a "professional". However, as Ferry clearly states, the professional titles, characters, and qualifications of the actors are irrelevant to determining whether the act was a "professional service."

What is relevant is the nature of the act itself. While defendant has argued that the acts of collecting, examining, and preparing the sperm for storage are highly technical in nature (and therefore require extensive "professional" training, skill, and knowledge) defendant has not contended that the decision to dispose or the act of disposing of Mr. Jablonski's sperm required any specialized training, skill or knowledge. Indeed, the disposal apparently was performed neither by Dr. Patton (or any other doctor), nor by Ms. Smith, but by a different employee named Philip Waters, who has not been alleged to possess such knowledge, skill, or training. The act is more appropriately characterized as one of an administrative or "bookkeeping" nature, in that it was done pursuant to a belief that Mr. Jablonski's account was delinquent and that he no longer desired to have his sperm stored with plaintiff. Mr. Waters himself verified the act's "administrative" nature in his deposition. See Waters Depos., p. 129:20-25.

Thus, while plaintiff may have been in the business of providing certain "professional" services, the act of destroying Mr. Jablonski's sperm does not rank among them

for the purposes of applying the "processional services" exclusion. While no South Carolina case has addressed a similar situation, courts in other jurisdictions have recognized that administrative or clerical tasks, even when associated with the rendering of medical or health services, do not fall under the "professional services" exclusion. See, e.g., Tyler v. Touro Infirmary, 223 So.2d 148, 152 (La. 1969) (holding that the act of counting sponges after surgery by a nurse was administrative in nature and not "professional," even though performed in conjunction with a medical service), overruled on other grounds, Garlington v. Kingsley, 289 So.2d 88 (1974); D'Antoni v. Sara Mayo Hosp., 144 So.2d 643, 646-47 (La. Ct. App. 1962) (holding that injury resulting from nurse's failure to carry out a doctor's order to raise the railing on a patient's bed did not result from provision of a "professional service"). Defendant, on the other hand, has done little more than conclusorily assert that "[i]t would be inappropriate to attempt to segregate the act of destruction of the sperm from the act of collecting, preparing, and storing [it]," with no citation to any opposing authority. Aetna's Response to Plaintiff's Motion for Summary Judgment, p. 11. Therefore, the court concludes that the destruction of the sperm was not caused by the exercise (or failure to exercise) some specialized medical knowledge or skill, but by a clerical decision, and defendant cannot invoke the "professional services" exclusion to deny coverage.

The last exclusion invoked by defendant is one which excludes coverage for "property damage" to "personal property in your care, custody, and control." Assuming that the sperm is "personal property" (as plaintiff has argued), it is undisputed that it was in the "care, custody, and control" of plaintiff at the time of its destruction. However, the exclusion states that it does not apply to instances in which liability is "assumed under a sidetrack agreement." Plaintiff argues that the agreement to store Mr. Jablonsik's sperm constitutes a "sidetrack agreement" by which liability for its

damage or destruction is assumed. Specifically, plaintiff argues that since the phrase "sidetrack agreement" is not defined in the policy, it is therefore ambiguous and must be construed in favor of coverage. The court disagrees.

Ambiguity in a contract of insurance may not be created by singling out a sentence or a clause, and a word in an insurance contract is not rendered ambiguous merely because it is not explicitly defined in the policy. Braswell v. Faircloth, 387 S.E.2d 707, 709 (S.C. Ct. App. 1989). Plaintiff acknowledges that the typical meaning of the work "sidetrack" refers to railroads,[2] but argues that it is ambiguous in this case because this policy refers to a fertility clinic, and has nothing to do with railroads. However, when construing a contract of insurance, the court should be guided by the contract as a whole. Grayson v. Aetna Ins. Co., 308 F. Supp 922 (D.S.C. 1970). In this case, the language of the policy as a whole supports defendant's construction, as it reveals that the policies at issue are written on a standard form that is intended to apply to all forms of commercial entities. Indeed, the policies not only refer specifically to railroads and railroad easements, but also to elevator maintenance agreements, architects and engineers, bulldozers, farm equipment, power cranes, road construction equipment, and other types of commercial or industrial property. Thus, there is nothing in the policy to indicate a deviation from the plain, ordinary, and popular meaning of the term "sidetrack."

In sum, the court finds persuasive the rationale articulated in the case of Auto-Owners Ins. Co. v. Barnes, 373 S.E.2d 217 (Ga. Ct. App. 1988), which involved a similar attempt by an insured to argue that damage to the personal property of others that he held on consignment was covered under a "sidetrack agreement":

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[2] Indeed, plaintiff acknowledges that the word "sidetrack" has no adjective meaning in the dictionary. See Webster's Ninth New Collegiate Dictionary (1987).

> As to the contractual assumption of liability provision, Barnes does not contend the agreements he had with the owners of the consigned property fit into five of the six categories or contract, as defined by the policy, the assumption of which would meet the requirements for liability coverage. Rather, Barnes ingeniously asserts that because the sixth category, "sidetrack agreements," was not explained in the policy, it was ambiguous, creating a question of fact and allowing the jury to decide whether Barnes' agreements were "sidetrack agreements" so as to provide liability coverage. However, "[w]ords generally bear their usual and common signification." [Citation omitted] We agree with the trial court that the term "sidetrack agreements," although not fully explained, clearly refers to railroads, and in its ordinary meaning does not contemplate the agreements made by Barnes.

Similarly, this court is persuaded that the term "sidetrack agreement" in the policies at issue clearly does not contemplate the agreement asserted by plaintiff and therefore that there is no coverage under the commercial general liability forms of the 1988 and 1989 policies. The fact that plaintiff's business does not involve railroads does not make the work "sidetrack" ambiguous, any more than the fact that plaintiff does not own a bulldozer makes the word "bulldozer" ambiguous.

(2) The 1990 Policy

As noted supra, plaintiff acknowledges that the loss at issue did not occur within the policy period of the 1990

policy, but asserts that defendant should be estopped from making such an argument, because defendant in 1992, 1994, and 1995. Plaintiff claims that it acted upon the belief that the timing of the events was not determinative of the coverage issue, and proceeded to negotiate a settlement with the Jablonskis which released it from liability in exchange for an assignment of plaintiff's rights to the proceeds of any insurance policies that might cover the loss.

The elements of estoppel are: (1) ignorance of the party invoking it to the truth as to the facts in question; (2) representations or conduct of the party estopped which misled; (3) reliance upon such representation or conduct; and (4) prejudicial change in position as a result of such reliance. Crescent Co. of Spartanburg, Inc. v. Ins. Co. of North America, 225 S.E.2d 656, 659 (1976). Plaintiff's claim of estoppel is deficient in numerous respects. First, plaintiff cannot honestly claim to have been "ignorant of the facts in question." It had before it a policy which clearly indicated its coverage period, and which also clearly stated that it only covered "occurrences" of bodily injury or property damage which happened during the policy period. Moreover, plaintiff knew the date of the loss in question, and knew (or should have known) that the date of the loss did not fall within the policy period of the 1990 policy (and thus, that the 1990 policy, by is own terms, did not cover the loss) long before it even filed the claim. The fact that defendant did not initially assert the timing of the events as a reason for denying coverage changes none of these facts.

Second, plaintiff cannot point to any "representations" by defendant which misled it. At most, plaintiff can only argue that defendant loses the right to assert a particular defense to coverage because it failed to invoke it at an earlier time. Plaintiff's argument is therefore more analogous to an assertion that defendant waived its defense based on the timing of the events. However, waiver (or at least, facts which would constitute a waiver) must be

pled in the complaint, which plaintiff has not done in this case. Crescent, 225 S.E.2d at 659-60.

Lastly, plaintiff's claim of detrimental reliance is also problematic. At the time that it negotiated the settlement with the Jablonskis, plaintiff knew that defendant had taken the position that the loss was not covered under the policies at issue. Whatever its belief as to the merits of the defenses asserted by defendant up until that point, plaintiff cannot claim that it did not know that defendant was contesting the coverage issue at the time it negotiated the settlement. Essentially, plaintiff is claiming not that it "relied" on any representations or conduct by defendant, but that it "relied" upon its own assessment of the merits of the defenses invoked by defendant up until that point, pursuant to which it apparently indicated to the Jablonskis that the 1990 policy "might" cover the loss of Mr. Jablonski's sperm. See Plaintiff's Memorandum in Opposition to Defendant's Summary Judgment Motion, p. 8.

Now plaintiff is attempting to argue that, if there is no coverage under the 1990 policy, the Jablonskis may sue to rescind the Covenant not to Execute, and that the prospect of such a suit satisfies the "prejudice" requirement of estoppel. Initially, the court is of the opinion that no such rescission could take place if plaintiff only represented to the Jablonskis that the 1990 policy "might" cover the loss at issue. Furthermore, however, to whatever extent plaintiff assured the Jablonskis that the 1990 policy "would" cover the loss at issue, it did so at its own peril, as it knew at the time it negotiated the settlement that defendant intended to contest coverage. Plaintiff cannot now claim that, in agreeing to the settlement, it " changed position" to its detriment because of any "conduct or representations" by defendant.

Furthermore, even if defendant is "estopped" from arguing that the timing of events precludes coverage under the 1990 policy, other considerations dictate that the 1990 policy does not cover the loss at issue. Like the 1988 and

1989 policies, the building and personal property form of the 1990 policy does not include a duty to defend, and contains the same two-year time limit for filing a legal action under that form. Also, the commercial general liability form of the 1990 policy contains the same exclusion for "personal property in the care, custody, and control of the insured," with the same "sidetrack agreement" provision, as the 1988 and 1989 policies. Thus, even if the timing of events did not preclude coverage under the 1990 policy, the aforementioned provisions within the policy would apply.

B. Bad Faith

Since 1983, South Carolina has recognized a cause of action for bad faith refusal to pay benefits under an insurance contract. See Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616 (S.C. 1983). The elements of such a claim are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured. Cock-n-Bull Steakhouse v. Generali Ins. Co., 466 S.E.2d 727, 730 (S.C. 1996) (citations omitted). In such an action, "[i]f there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mut. Automobile Ins. Co., 415 S.E.2d 393, 397 (S.C. 1992).

Initially, plaintiff claims that defendant failed to provide a defense to the Jablonskis' suit against plaintiff, and that such failure was a result of defendant's bad faith. In determining whether there has been a breach of a duty to defend, the court looks to the facts alleged in the complaint against the insured. If the facts alleged in the complaint fail to bring a claim within the policy coverage, or if the damage or loss at issue was caused by a reason unambiguously excluded under the policy, then an insured has no duty to

defend. Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distributors, Inc., 839 F. Supp. 376, 378 (D.S.C. 1993); Federated Mut. Ins. Co. v. Piedmont Petroleum Corp., 444 S.E.2d 532, 533 (S.C. Ct. App. 1994). As analyzed supra, under the facts alleged by plaintiff, there was no coverage (and hence, no duty to defend) under the 1990 policy, or any of the policies at issue in this action, for a variety of reasons -- most significantly, the alleged loss did not occur during the policy period of the 1990 policy, and coverage was clearly excluded by certain provisions in that policy (as well as the 1988 and 1989 policies). Therefore, plaintiff's claim of bad faith must fail, to the extent it is predicted on an assertion that defendant had a duty to defend plaintiff in the Jablonski litigation.

However, this is not the end of the bad faith inquiry. While plaintiff has no claim for bad faith refusal to defend under the 1990 policy (because there was no duty to defend under the 1990 policy), the South Carolina Supreme Court has also recognized that an insured may, under certain circumstances, have an action for an insurer's bad faith in handling or processing a third-party claim, and may recover consequential damages suffered as a result of that bad faith. Tadlock Painting Co. v. Maryland Cas. Co., 473 S.E.2d 52 (S.C. 1996). The Tadlock court recognized that the benefits due an insured are not limited to those that are "expressly set out in the contract," and that the insured, in entering into an insurance contract, is "entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith." Id. at 54-55 (citations omitted). Thus, the insured need not show a breach of an express contractual provision as a prerequisite to bringing an action for bad faith in handling a third-party claim.[3] Id. at 55. Therefore, even though plaintiff in this case is not entitled to benefits under the 1990 policy, there still remains the question of whether

[3]The Tadlock court also indicated that the rationale behind its ruling would be equally applicable to action for bad faith handling of a first-party claim. Id. at 54 n.2.

the record could support a claim that defendant breached its duty to process plaintiff's claim under that policy in good faith.

In support of its claim, plaintiff relies largely on in-house notes from defendant which indicate that one or more of its officers may have believed that the policy covered the events at issue, or at least believed that coverage was ambiguous. Plaintiff specifically points to the notes of Lee Sheorn, one of defendant's agents. She consistently indicated in her notes that, because of various exclusions, the policies did not cover the Jablonskis' claims against plaintiff to the extent that those claims were based on the actual destruction of Mr. Jablonski's sperm -- however, her notes also reveal some ambivalence on the issue of whether the policies would cover those claims to the extent that they were based on allegations of negligent recordkeeping by plaintiff. On that point, Ms. Sheorn wrote in her notes, "GCL [general commercial liability policy] -- couldn't find exclusion," and that the claim apparently fell in a "gray area" as far as the "professional services" exclusion in the umbrella coverage form was concerned. Those notes also indicate that defendant had "decided to do nothing -- sit tight for now."

Plaintiff also cites deposition testimony from another of defendant's agents in which the agent (a man named John Dabbs) was questioned about what, if any, investigation defendant performed as to the nature of the Jablonskis' claims against plaintiff. It appears from the pages cited that defendant took the position that the Jablonskis' claims were based on a medical procedure or medical treatment, and thus that those claims were not covered under the 1990 policy. However, it also appears from those pages that defendant did not conduct any inquires of medical personnel (or any other type of investigation) to ascertain whether the processes of collecting, freezing, storing, and disposing of sperm constituted "medical treatment". Mr. Dabbs indicated in his deposition that he simply relied on "common sense" in making that determination. Dabbs Depos., pp. 63-67

(attached as Exhibit E to plaintiff's memorandum in support of summary judgment).

Plaintiff further argues that other excerpts from Mr. Dabbs' deposition demonstrate that defendant failed to follow its own internal policies regarding claims evaluations, and that its conduct amounted to "conscious inaction in a case in which coverage was clear." See Plaintiff's Memorandum in Support of Summary Judgment, p. 21 (citing Dabbs Depos, pp. 80 & 123). However, nowhere in the cited excerpts is there any sort of acknowledgment, or even a suggestion, that defendant violated its internal procedures in its investigation. A reading of these excerpts reveal that they do nothing more than re-iterate the circumstances reflected in Ms. Sheorn's notes -- specifically, that defendant may have thought, at some point, that plaintiff's claim fell into a "gray area," and that it decided to maintain its position of denial. At the very most, then, plaintiff's evidence might support a finding of some belief on the part of defendant that the issue of coverage might be ambiguous with respect to certain provisions in the policy, and that defendant perhaps should have conducted further inquires to determine if the claims at issue were based on a process that constituted "medical treatment." However, the court is of the opinion that the record, as it currently stands, only creates a question of fact about the bad faith issue -- it does not support a conclusion that defendant committed bad faith as a matter of law. Furthermore, the court concludes that the record could not support a finding that defendant's conduct was willful or in reckless disregard of plaintiff's rights -- thus, plaintiff's claim for punitive damages is

stricken.[4] Crossley, 415 S.E.2d at 396 (plaintiff may only cover punitive damages in bad faith action by providing defendant's conduct was willful and in reckless disregard of his rights).

Thus, the court is left with plaintiff's claim for consequential damages. Plaintiff claims that defendant's bad faith renders it liable for the unsatisfied $1,000,000 portion of the settlement with the Jablonskis, and for plaintiff's expenses in providing for its own defense. However, as far as the $1,000,000 settlement is concerned, the Jablonskis have given plaintiff a Covenant not to Execute, in exchange for the right to collect against any insurance policies of plaintiff's that may be in place. Thus, plaintiff cannot claim to have suffered any "consequential damages" stemming from the settlement amount itself.

As to plaintiff's "defense costs," the record reveals that plaintiff was defended in the Jablonski litigation by the South Carolina Medical Malpractice JUA, which bore most, if not all, of plaintiff's litigation expenses. The record also indicates that plaintiff retained attorney Dewey Wise of the firm Wise and Cole in some capacity during the underlying litigation, although his role in that litigation, if any, is unclear. Under the current record, the court cannot determine what, if any, legal expenses associated with the Jablonski litigation were borne by plaintiff -- thus, summary judgment on this issue is not warranted, and the record will remain open should the parties wish to submit any affidavits or other filings pertaining to this issue.

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[4]Plaintiff cites the case of Palmetto Federal Savings Bank of S.C. v. Industrial Valley Title Ins. Co., 756 F. Supp. 925 (D.S.C. 1991), in support of its argument that defendant's "inaction" constitutes a basis for punitive damages. However that opinion (along with all the legal conclusions contained therein) was subsequently vacated in its entirety by Palmetto Federal Savings Bank of S.C. v. Industrial Valley Title Ins. Co., 1991 WL 832830 (D.S.C. 1991).

IV. CONCLUSION

It is therefore,

ORDERED, for the foregoing reasons, that plaintiff's motion for summary judgment is **DENIED**. It is also,

ORDERED, for the foregoing reasons, that defendant's motion for summary judgment is **GRANTED IN PART AND DENIED IN PART.** Defendant's motion is granted as to plaintiff's claim for breach of contract and plaintiff's claim for punitive damages, but denied as to plaintiff's claim for bad faith, to extent that plaintiff claims that defendant acted in bad faith in the handling or processing of plaintiff's claim.

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy
United States District Judge

Charleston, South Carolina
February 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: March 24, 2000

No. 99-1736
CA-97-1602-2

SOUTHEASTERN FERTILITY CENTER

Plaintiff - Appellant

v.

THE AETNA CASUALTY AND SURETY COMPANY

Defendant - Appellee

On Petition for Rehearing En Banc

The Appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTHEASTERN FERTILITY CENTER, PA,	)	CA#: 2:97-1602-23
Plaintiff,	)	
v.	)	JUDGMENT
AETNA CASUALTY & SURETY, CO.,	)	
Defendant.	)	ENTERED 5/06/99

This action came before the Court, the Honorable P. Michael Duffy, United States District Judge, presiding on both plaintiff's and defendants' motions for summary judgment. The issues have been heard and a decision duly rendered. Pursuant to the Court's February 22, 1999; April 7, 1999 and May 5, 1999 orders.

IT IS ORDERED that 1) plaintiff's March 31, 1998 motion for summary judgement is **DENIED** 2) defendants' March 31, 1998 motion for summary judgment is **GRANTED** as to plaintiff's claims for breach of contract and punitive damages but **DENIED** as to plaintiff's claim for bad faith 3) plaintiff's March 4, 1999 motion and supplemental motion to alter or amend judgment and/or to certify question to the South Carolina Supreme Court are **DENIED**.

IT IS FURTHER ORDERED that the trial of plaintiff's remaining claim for bad faith be **STAYED** pending appeal of judgment.

LARRY W. PROPES
Clerk of the Court

BY: /s/ Shireen J. Nelson
Deputy Clerk

May 6, 1999
Charleston, South Carolina